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No. 82-131

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION, owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,

Petitioner,

vs.

HOWARD E. PFEIFER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUT

RESPONDENT'S BRIEF IN OPPOSITION

JEROME M. LIBENSON, ESQ.
BASKIN AND SEARS, P.C.
10th Floor, Frick Bldg.
Pittsburgh, PA 15219
(412) 562-8721

Attorneys for Respondent,
Howard E. Pfeifer

THE QUESTIONS PRESENTED FOR REVIEW

Whether this Court should review an opinion of the United States Court of Appeals for the Third Circuit which:

(1) holds that Respondent, Howard E. Pfeifer ("Pfeifer") had a valid cause of action against his employer-vessel owner pro hac vice, under Section 905(b) of the Longshoremen's and Harbor Worker's Compensation Act ("LHWCA") in accordance with well-established and controlling federal case law;

(2) approves an award of damages under the LHWCA fashioned by appropriate legal concepts relative to the calculation of damages; and

(3) concludes that the District Court properly mitigated Pfeifer's damages on the basis of the minimum wage rate, where the record clearly supports factual findings that J&L never offered Pfeifer any type of work nor discussed the availability of a light duty position with Pfeifer after his injury.

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IN THE
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October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION, owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,

Petitioner,

vs.

HOWARD E. PFEIFER,

Respondent.

BRIEF BY RESPONDENT HOWARD E. PFEIFER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, Howard E. Pfeifer, opposes the petition for writ of certiorari for the reasons presented herein.

COUNTERSTATEMENT OF THE CASE

Respondent, Howard E. Pfeifer, brought this action pursuant to §905(b) of the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 et seq. ("LHWCA"), to recover damages from Petitioner, Jones & Laughlin Steel Corporation ("J&L"), for personal injuries sustained as the result of J&L's negligence.

Pfeifer was employed by J&L as a landing helper on its coal barges. On January 13, 1978, he slipped and fell because of ice and snow that had accumulated on the gunnel of a barge on which he was working. He struck a barge rail and landed on his tailbone, and a heavy electric motor that he was carrying fell in his lap. He has not returned to work since the accident. He has been examined by a number of physicians, several of whom testified at the trial, and he has undergone extensive physical therapy.

In this non-jury action, the District Court found that J&L was negligent and that its negligence was the proximate cause of Pfeifer's accident and resulting injury. It determined further that Pfeifer was completely disabled from the date of the acci-

dent until July 1, 1979, and that thereafter he was capable of doing "light work" and lifing weights of up to twenty-five pounds, but that he could not work on the river. J&L has not offered Pfeifer a job of any type since his injury, and the parties have not discussed the availability of a light duty position.

The District Court determined that, as a vessel owner pro hac vice, J&L was liable for negligence under §905(b) of the LHWCA. In measuring damages, the District Court declined to consider future wage increases or to discount the award to present value, citing Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980). The District Court multiplied Pfeifer's 1978 annual wage by his work life expectancy, deducted the amount of compensation Pfeifer had received under the LHWCA, and subtracted his projected earnings at minimum wage from July 1, 1979, until his sixty-fifth birthday.

J&L does not challenge the District Court's findings that J&L was negligent and that its negligence was the proximate cause of Pfeifer's injury, nor does it contend that it was not correctly found to be an owner pro hac vice.

REASONS FOR DENYING THE WRIT

Rule 17 of the Rules of the Supreme Court of the United States provides that: "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." In the case sub judice, the Third Circuit's decision, which affirmed that of the District Court, is clearly correct and in accordance with applicable decisions of this Court and of federal appellate courts. Consequently, there are no special or important reasons for this Court to review the issues decided by the courts below, and the grounds asserted by J&L for the exercise of this Court's discretion are wholly without foundation or merit. A review of the arguments raised by J&L, and a presentation of the reasons for the denial of the writ, are presented separately for each issue below.

I. The decision of the Third Circuit affording Pfeifer a cause of action in negligence against his employer-vessel owner pro hac vice under Section 905(b)

of the 1972 Amendments to the LHWCA falls squarely within the holdings of each federal court of appeals which has addressed the issue, and there is no conflict in the circuits warranting review by this Court.

It has been clearly established by the federal courts of appeal that an injured employee may assert a cause of action in negligence against a vessel owner which is also the injured party's employer under Section 905(b) of the LHWCA. Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976); on appeal after remand, 610 F.2d 116 (3d Cir. 1979), vacated, 451 U.S. 965 (1981), reinstated on remand, 657 F.2d 25 (3d Cir. 1981) petition for cert. filed, 50 U.S.L.W. 3377 (U.S. Oct. 29, 1981) (No. 81-826), cert. denied April 5, 1982; Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976); Smith v. M/V Captain Fred, 546 F.2d 119 (5th Cir. 1977). J&L incorrectly asserts that there is a sharp division among the federal courts of appeal on this issue; to the contrary, a review of the decisions cited by J&L demonstrates the absence of any conflict in the circuits.

Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 545 F.2d 235 (1st Cir. 1976) and Arvidson v. Dillingham Corp., 462 F.2d 1 (9th Cir. 1972), cert. denied, 409 U.S. 983 (1972), cited by J&L, both involved interpretations of the LHWCA prior to the 1972 Amendments to the Act, and in no respect control the issue of J&L's liability under Section 905(b) of the 1972 Act. Furthermore, the interpretation of the pre-1972 LHWCA in Murphy is entirely dictum, because the First Circuit was without a sufficient record to determine whether the injured employee was covered by the LHWCA or whether the applicable state workman's compensation statute controlled. 545 F.2d at 237, 240-241. Murphy and Arvidson are further distinguishable in that the employees in question had been compensated under the state workman's compensation law, rather than the LHWCA, as in the case sub judice.

The remaining cases cited by J&L in its Petition at 7, do not reflect the decisions of any federal court of appeals, and therefore present no conflict with the well-established decisions of the Second, Third and Fifth Circuits. Furthermore, in Ed-

monds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979), this Court interpreted Section 905(b) as affording a longshoreman a cause of action in negligence in a situation "where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company." 443 U.S. at 264. This Court cited with approval Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731 (1967) and Reed v. The Yaka, 373 U.S. 410 (1963), noting that, in both cases, it had upheld a longshoreman's negligence or unseaworthiness action against the shipowner-stevedore. 443 U.S. at 264 n.13. This Court further emphasized throughout its opinion that Congress clearly intended to treat all longshoremen similarly, whether employed by an independent stevedore or a shipowner-stevedore:

> The second sentence [of Section 905(b)] means no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself. Id. at 266.

This Court also stressed the importance of liberally construing the 1972 Amendments to the benefit of the longshoremen the Act seeks to protect. Id. at 266, 270.

It should be noted that the Third Circuit stated that the identical arguments raised by J&L concerning the 1972 LHWCA Amendments were carefully considered in Griffith, supra, and were rejected by the Court. (Appendix A, 3a-4a).

Based on the above discussion, the Third Circuit's interpretation of Section 905(b), affording Pfeifer a cause of action in negligence against J&L, properly represents the holding which has been rendered by all circuits which have addressed the issue, is fully supported by this Court's decision in Edmonds, and has not been challenged by any controlling decision of the federal courts of appeal. Further review of this issue by this Court would not be warranted.

II. The Third Circuit properly applied federal law in calculating Pfeifer's damages.

J&L argues that the court below improperly applied Pennsylvania's law of damages in calculating Pfeifer's lost future earnings, and specifically, the decision of the Penn-

sylvania Supreme Court in Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980), in an action based on federal question jurisdiction.

This argument may be disposed of summarily on several grounds. First, the Third Circuit's opinion clearly indicates that the District Court did not consider itself to be bound by Kaczkowski in calculating Pfeifer's lost future earnings, but that the Court applied federal law in calculating damages. (App. A, 5a). Secondly, the Third Circuit itself held that J&L failed to preserve for review the contention that the lower court erred in applying Pennsylvania law, by not specifying any alleged error during the trial court proceedings and by failing to suggest or offer into evidence a legally appropriate course of action (App. A, 4a-6a). Based on these factors alone, J&L has waived any argument concerning the method of calculating damages.

In addition to the above grounds for declining review, it is well established that a federal court may properly borrow substantive state law and adopt it as federal law in calculating an award of damages. (App.

A, 7a-8a). See generally D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 472 (1942) (Jackson, J., concurring). This is particularly appropriate in the instant action where, unlike the antitrust treble damage statute, the LHWCA statute is silent as to the measure of damages to be applied. As a result, the lower court was clearly authorized as a matter of law to look to state law in fashioning a federal measure of damages, and the Third Circuit's decision was fully in accord with applicable federal precedent as established in this Court. See Imbler v. Pachtman, 424 U.S. 409 (1976); Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Monroe v. Pape, 365 U.S. 167 (1961); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

Further support for this position is found in the opinion of this Court in Romero v. International Terminal Operating Co., 358 U.S. 354, 373-374 (1959), wherein Justice Frankfurter stated:

> to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce...Maritime law is not a monistic system. The State and Federal

> Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

Additionally, and contrary to the allegations of J&L, there exists no great confusion or conflict among the circuits as to the issue of future inflation and the extent to which the effects of inflation should be taken into account in calculating damage awards. To the contrary, the vast majority of jurisdictions have held that future inflation is properly to be taken into account in calculating loss of future earnings. Doca v. Marina Mercante Nicaraguense, S. A., 634 F.2d 30 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1981); Steckler v. United States, 549 F.2d 1372 (10th Cir. 1977); United States v. English, 521 F.2d 63 (9th Cir. 1975); Riha v. Jasper Blackburn Corp., 516 F.2d 840 (8th Cir. 1975); Bach v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974) (decided under FELA as a matter of federal damages law); O'Shea v. Riverway Towing Co., No. 81-1924, slip op. (7th Cir. April 27, 1982); Pfeifer v. Jones & Laughlin Steel Corp., No. 81-1928, slip op. (3d Cir. April 16, 1982). Furthermore, the cases cited by J&L in an effort to demon-

strate a conflict are either inapposite or not controlling with respect to the issue of consideration of inflation in calculating damages, Byrd v. Reederei, 638 F.2d 1300, reh. granted, 650 F.2d 1324 (5th Cir. 1981) (criticized within the Fifth Circuit and rehearing granted on the issue of inflation); Williams v. United States, 435 F.2d 804 (1st Cir. 1970) (involving calculation of future loss of earnings under Rhode Island law in wrongful death action).

Moreover, in Norfolk & Western Railway Co. v. Liepelt, 444 U.S. 490 (1980), this Court recognized the reasonableness and propriety of estimating and accounting for the effects of inflation in fixing an award for future lost wages. Id. at 492, 494. See Doca, 634 F.2d at 36.

Absent any countervailing federal authority, allegations of error in the method of calculation applied below, or positive contention as to the proper method to have been applied in calculating damages, it is difficult to comprehend any basis for J&L's request for review. Nor has J&L demonstrated the manner in which the Third Circuit's decision creates confusion or controversy in calculating damages awards.

To the contrary, the Third Circuit's holding and analysis not only comports with the prevailing trend of the law of damages, but applies a method of calculation which is characterized by its efficiency of application and consistency of result. (App. A, 13a-16a).

Furthermore, were an inquiry to be made into the issue of the method to be employed in the calculation of damages, the instant case would be an inappropriate for such an inquiry. Pfeiffer was fifty-three (53) years of age at the time of his injury. As a result, calculation of his future loss of earnings is based on the relatively brief period of only twelve and one-half years. Any change in the method utilized would result in only minimal changes in the effective amount of Pfeifer's recovery, because of the short period of time involved prior to Pfeifer's presumed retirement.

Therefore, since the Third Circuit's decision comports with existing federal law, is based on sound legal principles, and is directed toward the advancement of consistency, certainty and judicial economy in fashioning awards, there are no special or significant reasons warranting the granting

of the requested petition for a writ of certiorari.

III. The District Court's use of the minimum wage as a factor in reducing Pfeifer's damage award, rather than the wage figure submitted by J&L, represents a finding of fact fully supported by the record and is not a proper subject of review by this Court.

In calculating Pfeifer's projected earnings, the District Court reduced his award by the amount of his projected earnings at the minimum wage until his presumed retirement at age sixty-five. This decision was fully supported by the facts adduced at trial. Specifically, these facts established that, as a result of his injuries, Pfeifer had been disabled from his regular employment, could no longer work on the river, and that J&L never offered Pfeifer a job of any type thereafter. Nor did J&L ever conduct any discussions with Pfeifer regarding the availability of a light duty job. (App. B, 36a).

Based on this factual predicate, J&L's argument that the award should have been reduced by the wages J&L pays its light duty

employees, when no light duty job was either offered or made available to Pfeifer, is wholly without merit. See Perini Corp. v. Heyde, 306 F. Supp. 1321, 1325-26 (D.R.I. 1969) (burden is on employer to establish that disabled employee has actual opportunities to obtain other work). Furthermore, J&L's argument that Pfeifer failed to pursue other employment is directly contradicted by the record.

Factual findings such as those rendered by the District Court below were properly reviewed by the Third Circuit under the "clearly erroneous" standard. Fed.R.Civ.P. 52(a). In this case, as the Third Circuit recognized, the Findings below were not clearly erroneous and were fully supported by the record. (App. A at 16a). As a result, the issue raised by J&L raises no novel or significant issue for consideration by this Court, and J&L's request for the granting of a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Jerome M. Libenson, Esquire

BASKIN AND SEARS, P.C.
10th Floor, Frick Building
Pittsburgh, PA 15219
(412) 562-8722

Counsel for Respondent,
HOWARD E. PFEIFER

AFFIDAVIT OF SERVICE

I hereby certify that three (3) true and correct copies of the within Brief by Respondent Howard E. Pfeifer in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, were sent to:

Robert W. Murdoch, Esquire
Jones, Gregg, Creehan & Gerace
1010 Grant Building
Pittsburgh, Pennsylvania 15219

by first class mail, postage prepaid, this 6th day of August, 1982.

Jerome M. Libenson, Esquire
BASKIN AND SEARS, P.C.
10th Floor, Frick Building
Pittsburgh, PA 15219

Attorney for Repondent,
HOWARD E. PFEIFER